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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Misc. 1577

RAYMOND NELSON,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ Of Certiorari To The Appellate Court of Illinois, First District)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is reported at 109 Ill. App. 2d 396, 248 N.E. 2d 740 (1969).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

Whether the petitioner was deprived of due process of law by the trial court's refusal to give three of his tendered jury instructions.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution.

Article Two, Section Nine of the Illinois constitution.

STATEMENT OF THE CASE

The petitioner, Raymond C. Nelson, serving a term of five to six years, was convicted in the Circuit Court of Cook County, Illinois, after a trial by jury, for unlawful possession of narcotic drugs.[1] The conviction was affirmed by the Appellate Court of Illinois, First District, *People* v. *Nelson,* 109 Ill. App. 2d 396, 248 N.E. 2d 740 (1969).

The evidence presented at the trial was adequately summarized in the opinion of the court:

> "On February 2, 1965, at approximately 1:43 p.m., Officers Arnold and Williams executed a search warrant at 4940 South Indiana Avenue, Chicago, Illinois, Apartment 232, naming as an occupant the defendant, Raymond C. Nelson. When the officers entered the apartment the defendant was clothed in his shorts and T-shirt, and appeared to have just gotten out of bed. Officer Arnold observed that the bed in the bedroom was ruffled, as if someone had slept in it. A search

1. Ill. Rev. Stat. Ch. 38, §22-3 (1963).

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of the apartment revealed men's clothing in both rooms of the apartment. On a small table in the bedroom was a brown leather pouch, along with defendant's wallet and several coins, in which Officer Williams found seven foil wrapped packages, each package containing a white powdered substance. A field test was performed and such powder was tentatively identified as heroin. The defendant denied that the pouch or its contents were his and denied any knowledge of its contents. The defendant dressed himself and was searched, but no narcotics were found on his person. The clothes defendant put on were taken from a closet in the bedroom and other areas of the apartment. The officers and the defendant then proceeded to the police station. The tin-foil packages were brought to the Chicago Police Department's Crime Laboratory, where their contents were found to contain heroin." 109 Ill. App. 2d at 396-97, 248 N.E. 2d at 740-42.

On Appeal, petitioner alleged that the trial court erred in refusing to give defense instructions No. 12, 13, and 14[2]

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2. Defense's Instruction No. 12 Refused:

The Court instructs you that to commit the crime of unlawful possession of narcotic drugs, the defendant must have immediate and exclusive control of narcotics and must have knowledge of the presence of these narcotics.

Defense's Instruction No. 13 Refused:

If you find from the evidence that on February 2nd, 1965 Raymond Nelson had immediate and exclusive control of narcotics and had knowledge of the presence of these narcotics, you should find Raymond Nelson guilty.

Defense Instruction No. 14 Refused:

If, however, the State has not proven beyond all reasonable doubt that on February 2nd, 1965 Raymond Nelson had immediate and exclusive control of narcotics and that he had knowledge of the presence of these narcotics, you should find Raymond Nelson not guilty. (A. 45)

to the jury. The Appellate Court held that these instructions were properly refused.

REASONS FOR DENYING THE WRIT

PETITIONER'S TENDERED JURY INSTRUCTIONS WERE PROPERLY REFUSED BECAUSE THEY MISSTATED ILLINOIS LAW AND WERE NOT BASED ON THE EVIDENCE.

To support a conviction, under Illinois law, for unlawful possession of narcotics, proof of constructive possession is sufficient without establishing actual physical possession; and guilty knowledge may be established by evidence of acts, declarations or conduct of the defendant from which it may be fairly inferred that he knew of the existence of narcotics at the place where they were found.[3] In the instant case the prosecution sought to prove constructive possession by virtue of the circumstantial evidence available. At no time did the State proceed on a theory of actual physical possession. The defense instructions which were offered and refused misstated Illinois law in that they suggested "immediate" or actual possession was a prerequisite to conviction. Since they were confusing and might lead a jury to believe that constructive possession was insufficient to sustain a conviction, they were properly refused. *People* v. *Rongetti,* 344 Ill. 278 (1931); *People* v. *Schyman,* 374 Ill. 292 (1940); *People* v. *Moorelander,* 25 Ill. 2d 309 (1962). Furthermore, in Illinois when a party finds fault with the court's instructions to the jury

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3. E.g. People v. Mack, 12 Ill. 2d 151, (1957); People v. Thomas, 31 Ill. 2d 212, (1964); People v. Archie, 105 Ill. App. 2d 211, (1969).

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it is incumbent upon him to offer his own *proper* instructions. Failing to do so, his objections are waived on appeal. *People* v. *Mirabella,* 294 Ill. 246 (1920); *People* v. *Hawes,* 8 Ill. 2d 501 (1956); cf. *People* v. *Orr,* 24 Ill. 2d 100 (1962). Having offered erroneous instructions which were properly refused, the petitioner cannot now assign error to the trial court's action, and the federal question now sought to be raised does not rest upon a record which would make provident the granting of the Writ.[4]

CONCLUSION

For the above stated reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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4. Indeed, no argument that the refusal to give the Petitioner's instructions or others violated the federal constitution was ever made in the trial court or in the Appellate Court of Illinois. It is made for the first time in the Petition for Certiorari.